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JUN 5 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 1347 109

SALVATORE VIRZERA,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JULIEN CORNELL,
Attorney for Petitioner.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Salvatore Virzera respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the decision of that court made on May 7, 1945, affirming judgment of the District Court for the Eastern District of New York rendered February 17, 1944 convicting the petitioner for violation of the Selective Training and Service Act of 1940.

Statement of Matters Involved

The petitioner was charged with having made false statements to his draft board in violation of the Selective Training and Service Act of 1940 (50 U. S. C. App. § 301 *et seq.*).

At the trial the petitioner admitted having made the statements in question, which consisted of statements that he is an Italian citizen, but he testified that when the statements were made he was under the belief that he was an Italian citizen and that he made such statements honestly, believing them to be true and without any intention to violate the draft law.

As shown by uncontradicted testimony of the petitioner, his father was an Italian citizen who became naturalized in 1924 (fol. 12).* The petitioner being a minor at the time of such naturalization, acquired citizenship by virtue thereof and subsequently asserted the rights of citizenship, including the right to vote (fols. 14-18). However, when the Alien Registration Act became law in 1940, the petitioner having been previously challenged by an election board, and being in some doubt regarding his citizenship, investigated the circumstances surrounding his father's naturalization, the father having since died (fols. 78, 79). The petitioner discovered that his father had returned to Italy during the five years immediately preceding his naturalization, and as he testified, concluded from this discovery that his father's naturalization had been fraudulent (fols. 80-82). The petitioner further testified that he investigated the naturalization laws and found that it was a criminal offense to claim citizenship under fraudulent naturalization (fols. 82-84). For these reasons he registered as an Italian citizen under the Alien Registration Act (fol. 84). All of these happenings took place prior to the enactment of the Selective Training and Service Act.

When that Act took effect, the petitioner registered under it and filed a questionnaire stating that he was an Italian citizen (fol. 86). Count one of the indictment (fols. 6, 7) charges him with thereby making a false statement in violation of the Act. The petitioner was also convicted

* References are to pages of the original record, which appear as folios in the transcript as printed for the use of this Court.

on a second count in the indictment (fol. 8) which charges him with having subsequently repeated the false statement that he was an Italian citizen. The second statement was made after the petitioner had been summoned before his draft board and had disclosed to the board all the circumstances stated above with regard to his citizenship (fols. 40-43). The petitioner continued to maintain that he regarded himself as an Italian citizen. After disclosing the facts concerning his citizenship to the board, the petitioner was asked to file a second written statement with regard to his citizenship (fol. 54) in which, after consulting a lawyer who corroborated the petitioner's view that he was an Italian citizen (fol. 98) he repeated the contention that he was an Italian citizen. It is this second written statement which is the subject of the second count in the indictment under which the petitioner was also convicted of having made a false statement in violation of the Act. The petitioner appealed his conviction which, however, was affirmed on the ground that the jury might have disbelieved the petitioner's testimony with regard to the honesty of his intention in making the statements in question, and might have inferred from the circumstances that there was the necessary criminal intent.

Jurisdiction

The jurisdiction of this court is invoked under § 240 of the Judicial Code (28 U. S. C. § 347).

Question Presented

Did the courts below err in holding that there was evidence upon which the jury could find that the petitioner had the criminal intent required for a violation of the Selective Training and Service Act of 1940?

Statute Involved

§ 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. § 311) provides in part:

> "*Sec. 11. Penalties.*
>
> * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment."

Reasons for Allowance of Writ

As will be shown below, the Circuit Court of Appeals has affirmed a conviction, despite the absence of any proof of criminal intent and in the face of evidence which indisputably showed the absence of criminal intent. The court below has thereby sanctioned a gross departure by the trial court from proper standards of fairness in a criminal trial to an extent which calls for the exercise of this court's power of supervision and correction.

The statute which the petitioner is charged with having violated punishes any false statement as to liability for service which is knowingly made. This provision in the statute has been held to refer to the usual criminal intent. *U. S.* v. *Hoffman,* 137 Fed. 2d, 416, 419.

The fact is undisputed that the petitioner first asserted that he was an Italian citizen when he registered under the Alien Registration Act, which was before the Selective Training and Service Act was adopted, and before he could have had any intent to evade military service. The peti-

tioner testified that he was under the honest although erroneous belief that he was an Italian citizen, because of a fraud committed by his father in obtaining naturalization. The Circuit Court of Appeals held that the jury was free to disregard this testimony and in the absence of such testimony the jury might infer from the surrounding circumstances the criminal intent necessary to a conviction. A reading of the record, however, discloses no basis upon which such an inference could be made. The government failed wholly to produce any evidence whatever of criminal intent and that essential element of the crime not having been proved, the trial court should have directed a verdict of acquittal.

Even if it be assumed, however, that with regard to the first count of the indictment, at least, there was sufficient evidence of criminal intent to go to the jury, on the other count it was proved beyond any question that the petitioner had no criminal intent. This count of the indictment charged the petitioner with having made a statement in writing that he was an Italian citizen, at a time when he had disclosed at a hearing before his draft board his reasons for believing that he was an Italian citizen and had given to the draft board all the facts upon which they could determine whether his claim of Italian citizenship was well-founded or was erroneous. Since the petitioner had truthfully told the whole story to his draft board, concealing nothing, and giving them all the facts from which his citizenship status could be determined, he could not possibly have intended to evade the draft in making the claim of Italian citizenship.

Although the petitioner had made a full, complete and truthful disclosure of all the facts upon which he could have been classified as available for military service, he has been convicted of making a false statement, merely because he erroneously concluded from those facts that he was an Italian citizen.

It is inconceivable that the petitioner could have had any intention to violate the law in reaching an erroneous conclusion with regard to his citizenship status and making an erroneous statement based on that conclusion, since he had revealed to his draft board all the facts upon which they could determine his status and decide the correctness of his claim.

The petitioner had been called before the draft board for the very purpose of explaining this point and concededly had made a full and truthful disclosure. This being so, it is utterly impossible that the false claim which the petitioner made, could have been made with intent to evade the law and it follows that at least under this count of the indictment, the petitioner committed no crime, nor was there any evidence upon which a jury could so conclude.

It is important that this court in the exercise of its supervisory powers should correct the grievous error which was committed by the trial court and has been allowed to stand on appeal.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding it to certify and send to this court a transcript of the record and of all proceedings herein, and that the judgment of conviction of the District Court for the Eastern District of New York be reversed by this court and for such other and further relief in the premises as this court may deem just and proper.

Respectfully submitted,

SALVATORE VIRZERA
Petitioner

By JULIEN CORNELL
Attorney for Petitioner
15 William Street
New York 5, N. Y.

FILED
JUN 5 1945
CHARLES ELMORE CROPLEY
CLERK

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ORESTE VIRZERA,

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No.

ORESTE VIRZERA,

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against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner Oreste Virzera respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review the decision of that court made on May 7, 1945, affirming judgment of the District Court for the Eastern District of New York rendered February 17, 1944 convicting the petitioner for violation of the Selective Training and Service Act of 1940.

Statement of Matters Involved

The petitioner was charged with having made false statements to his draft board in violation of the Selective Training and Service Act of 1940 (50 U. S. C. App. § 301 *et seq.*).

At the trial the petitioner admitted having made the statements in question, which consisted of statements that he is an Italian citizen, but he testified that when the statements were made he was under the belief that he was an Italian citizen and that he made such statements honestly, believing them to be true and without any intention to violate the draft law.

As shown by uncontradicted testimony of the petitioner, his father was an Italian citizen who became naturalized in 1924 (fol. 13).* The petitioner being a minor at the time of such naturalization, acquired citizenship by virtue thereof and subsequently asserted the rights of citizenship, including the right to vote (fols. 16-22). However, when the Alien Registration Act became law in 1940, the petitioner having been previously challenged by an election board, and being in some doubt regarding his citizenship, investigated the circumstances surrounding his father's naturalization, the father having since died (fol. 53). The petitioner discovered that his father had returned to Italy during the five years immediately preceding his naturalization, and as he testified, concluded from this discovery that his father's naturalization had been fraudulent (fols. 54-56). The petitioner further testified that he investigated the naturalization laws and found that it was a criminal offense to claim citizenship under fraudulent naturalization (fol. 56). For these reasons he registered as an Italian citizen under the Alien Registration Act (fol. 57). All of these happenings took place prior to the enactment of the Selective Training and Service Act.

When that Act took effect, the petitioner registered under it and filed a questionnaire stating that he was an Italian citizen (fol. 58). Count one of the indictment (fols. 6, 7) charges him with thereby making a false statement in violation of the Act. The petitioner was also convicted

* References are to pages of the original record, which appear as folios in the transcript as printed for the use of this Court.

on a third count in the indictment (fol. 9) which charges him with having subsequently repeated the false statement that he was an Italian citizen. The second statement was made after the petitioner had been summoned before his draft board and had disclosed to the board all the circumstances stated above with regard to his citizenship (fols. 28-35). The petitioner continued to maintain that he regarded himself as an Italian citizen (fol. 39). After disclosing the facts concerning his citizenship to the board, the petitioner was asked to file a second written statement with regard to his citizenship (fols. 25-26) in which, after consulting a lawyer who corroborated the petitioner's view that he was an Italian citizen (fols. 85, 86) he repeated the contention that he was an Italian citizen. It is this second written statement which is the subject of the third count in the indictment under which the petitioner was also convicted of having made a false statement in violation of the Act. The petitioner appealed his conviction which, however, was affirmed on the ground that the jury might have disbelieved the petitioner's testimony with regard to the honesty of his intention in making the statements in question, and might have inferred from the circumstances that there was the necessary criminal intent.

Jurisdiction

The jurisdiction of this court is invoked under § 240 of the Judicial Code (28 U. S. C. § 347).

Question Presented

Did the courts below err in holding that there was evidence upon which the jury could find that the petitioner had the criminal intent required for a violation of the Selective Training and Service Act of 1940?

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§ 11 of the Selective Training and Service Act of 1940 (50 U. S. C. App. § 311) provides in part:

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Reasons for Allowance of Writ

As will be shown below, the Circuit Court of Appeals has affirmed a conviction, despite the absence of any proof of criminal intent and in the face of evidence which indisputably showed the absence of criminal intent. The court below has thereby sanctioned a gross departure by the trial court from proper standards of fairness in a criminal trial to an extent which calls for the exercise of this court's power of supervision and correction.

The statute which the petitioner is charged with having violated punishes any false statement as to liability for service which is knowingly made. This provision in the statute has been held to refer to the usual criminal intent. *U. S.* v. *Hoffman*, 137 Fed. 2d, 416, 419.

The fact is undisputed that the petitioner first asserted that he was an Italian citizen when he registered under the Alien Registration Act, which was before the Selective Training and Service Act was adopted, and before he could have had any intent to evade military service. The peti-

tioner testified that he was under the honest although erroneous belief that he was an Italian citizen, because of a fraud committed by his father in obtaining naturalization. The Circuit Court of Appeals held that the jury was free to disregard this testimony and in the absence of such testimony the jury might infer from the surrounding circumstances the criminal intent necessary to a conviction. A reading of the record, however, discloses no basis upon which such an inference could be made. The government failed wholly to produce any evidence whatever of criminal intent and that essential element of the crime not having been proved, the trial court should have directed a verdict of acquittal.

Even if it be assumed, however, that with regard to the first count of the indictment, at least, there was sufficient evidence of criminal intent to go to the jury, on the other count it was proved beyond any question that the petitioner had no criminal intent. This count of the indictment charged the petitioner with having made a statement in writing that he was an Italian citizen, at a time when he had disclosed at a hearing before his draft board his reasons for believing that he was an Italian citizen and had given to the draft board all the facts upon which they could determine whether his claim of Italian citizenship was well-founded or was erroneous. Since the petitioner had truthfully told the whole story to his draft board, concealing nothing, and giving them all the facts from which his citizenship status could be determined, he could not possibly have intended to evade the draft in making the claim of Italian citizenship.

Although the petitioner had made a full, complete and truthful disclosure of all the facts upon which he could have been classified as available for military service, he has been convicted of making a false statement, merely because he erroneously concluded from those facts that he was an Italian citizen.

It is inconceivable that the petitioner could have had any intention to violate the law in reaching an erroneous conclusion with regard to his citizenship status and making an erroneous statement based on that conclusion, since he had revealed to his draft board all the facts upon which they could determine his status and decide the correctness of his claim.

The petitioner had been called before the draft board for the very purpose of explaining this point and concededly had made a full and truthful disclosure. This being so, it is utterly impossible that the false claim which the petitioner made, could have been made with intent to evade the law and it follows that at least under this count of the indictment, the petitioner committed no crime, nor was there any evidence upon which a jury could so conclude.

It is important that this court in the exercise of its supervisory powers should correct the grievous error which was committed by the trial court and has been allowed to stand on appeal.

WHEREFORE, petitioner prays that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding it to certify and send to this court a transcript of the record and of all proceedings herein, and that the judgment of conviction of the District Court for the Eastern District of New York be reversed by this court and for such other and further relief in the premises as this court may deem just and proper.

Respectfully submitted,

ORESTE VIRZERA,
Petitioner

By JULIEN CORNELL
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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 109

SALVATORE VIRZERA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 110

ORESTE VIRZERA

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 109, R. 74–77; No. 110, R. 73–76), which has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered May 23, 1945 (No. 109, R. 77; No. 110, R. 76). The petitions for writs of certiorari were filed June 5, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the evidence adduced at petitioners' trials on charges of knowingly making false statements to their local draft boards is sufficient to sustain their convictions.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 311) provides:

> * * * any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or non-liability of himself or any other person for service under the provisions of this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. * * *.

STATEMENT

On December 16, 1943, indictments were returned in the United States District Court for the Eastern District of New York against petitioner Salvatore Virzera in two counts and against petitioner Oreste Virzera in three counts, charging violations of Section 11 of the Selective Training and Service Act. Count 1 (No. 109, R. 3–4) of the indictment against Salvatore Virzera charged that on or about March 18, 1941, he falsely stated in the questionnaire which he submitted to his local board that he was not a citizen of the United States and that he was a citizen or subject of Italy, well knowing that the statements were untrue; count 2 (No. 109, R. 4) charged a similar knowing false representation on or about November 18, 1943, in an "Alien's Personal History and Statement" submitted by him to his local board. Counts 1 and 3[1] (No. 110, R. 3–5) of the indictment against Oreste Virzera charged like violations. At their separate jury trials petitioners were each convicted on both counts (No. 109, R. 68; No. 110, R. 66) and were sentenced to imprisonment for three years on each count, the sentences to run concurrently (No. 109, R. 70; No. 110, R. 68–69). Upon appeals which were consolidated and disposed of in a single opinion, the judgments were affirmed by

[1] Count 2 was dismissed on motion of the Government (No. 110, R. 6).

the Circuit Court of Appeals for the Second Circuit (No. 109, R. 74–77; No. 110, R. 73–76).

At petitioners' trials, it was undisputed that they are citizens of the United States by virtue of the naturalization of their father and that they misrepresented to their draft board that they were citizens of Italy, not of this country. Their sole defense was that they did not knowingly falsify their citizenship status, that they honestly believed that their father had acquired citizenship by fraud and that they therefore were not lawful citizens of the United States. The pertinent facts relating to this issue, which were substantially the same in both cases, may be summarized as follows:

It was stipulated between the parties, *inter alia,* that early in their childhood, petitioners' father, who had previously migrated to the United States, brought them to the United States from Italy; that some ten years later, on February 7, 1924, a certificate of naturalization was issued to the father; that petitioner Salvatore Virzera, claiming citizenship on the basis of the naturalization of his father, voted in New York elections in 1932, 1933, 1934, 1936, 1937, and 1938; and that petitioner Oreste Virzera similarly voted in the elections of 1934, 1936, 1937, and 1938 (No. 109, R. 5–10; No. 110, R. 6–12).

In an interview on August 20, 1943, with their local board, petitioners denied that their father, who was then deceased (No. 110, R. 19), had ever been naturalized or that he had been a citizen of

the United States (No. 109, R. 15, 16, 22; No. 110, R. 22). Salvatore told the board that "he would rather go to jail than serve in the United States Army" (No. 109, R. 25; see also No. 110, R. 51). Subsequently, in an interview with an F. B. I. agent, Salvatore denied that he had voted in any elections and that his father had been a citizen or had been naturalized, but upon being presented with his voting record, he admitted having voted and that his father had been naturalized (No. 109, R. 40–41). In a similar interview Oreste denied that he was a citizen, or that he had any knowledge of the naturalization of his father, or that he had ever voted, and then declined to answer further questions (No. 110, R. 24–25).

In their defense, petitioners testified that after 1938 they undertook to investigate their citizenship status and that among their deceased father's papers they found documents indicating to them that their father had served in the Italian Army for a short period during the five-year period preceding his naturalization; that, relying on information contained in an otherwise unidentified "naturalization pamphlet" (No. 109, R. 47; No. 110, R. 33) and without consulting an attorney or any government agency, they concluded that their father had received his naturalization certificate by fraud and that they therefore were not citizens of this country. Accordingly, they registered with the Government as aliens and subse-

quently represented to their local board that they were not citizens of the United States (No. 109, R. 43–48, 53–58; No. 110, R. 30–36, 39). Both petitioners admitted on the stand that they had falsified the facts in their discussions with an F. B. I. agent (No. 109, R. 58; No. 110, R. 41, 52).

ARGUMENT

Petitioners do not dispute the fact that they are citizens of the United States or that they misrepresented their citizenship status to their local board. Their sole contention (No. 109, Pet. 4–6; No. 110, Pet. 4–6) is that there is no evidence showing that they knew the representations to be false when they made them. We think it plain, as did the court below (No. 109, R. 75), that the Government's evidence amply supports the verdict of the jury in each of the cases.

The only basis for petitioners' argument that they had no criminal intent is their claim that they mistakenly, but honestly, believed that their derivative citizenship was founded on the asserted fraud of their father and that they were not lawful citizens. If the juries had accepted this defense as credible, petitioners would have been entitled to an acquittal, as the trial court instructed the jury in each case (No. 109, R. 66–67; No. 110, R. 63–64). But the verdicts demonstrate that the juries were unwilling to accept petitioners' defense.

The Government's evidence was plainly sufficient to permit the juries to find that the misrepresentations were purposeful. It is clear that petitioners knew of the naturalization of their father, for they voted for a number of years on the basis of their father's naturalization. Yet they both stated to their local board and an F. B. I. agent that their father had never been naturalized, and, in addition, they told the agent that they had never voted. This, coupled with Salvatore's statement to the board that "he would rather go to jail than serve in the United States Army" (*supra,* p. 5), plainly shows that petitioners sought to conceal their true citizenship status in order to evade military service.[2] It was, of course, for the jury in each case to draw the inferences from the evidence. The inferences drawn by the juries have been sustained by the trial judge and the court below. In these circumstances, we submit that there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.[3]

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[2] As enemy aliens, petitioners would not have been required to perform military service unless they were found acceptable by the armed forces (Selective Service Regulation 622.43). Salvatore stated in an alien's personal history form, which he submitted to his local board, that he would not fight for the United States (No. 109, R. 57).

[3] Petitioners suggest that even if the evidence was sufficient to support the verdicts under count 1 of each indictment, it

CONCLUSION

The evidence is amply sufficient to sustain the verdicts of the juries. No question of importance is presented and no conflict of decisions is involved. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

HUGH B. COX
Acting Solicitor General.
JAMES M. MCINERNEY,
Acting Head, Criminal Division.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

JULY 1945.

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was insufficient in respect of the other counts, because at the time of the misrepresentations described in those counts, petitioners had disclosed the pertinent facts to their local board. We deem it unnecessary to meet this argument, for the general sentences imposed upon petitioners are each supported by the conviction under count 1 of each indictment. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105, and cases cited.

U. S. GOVERNMENT PRINTING OFFICE: 1945